IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

CRIMINAL APPEAL NO. 878 of 2004

M/s.Pramila Vijay Rana .. Appellant

versus

Ashok Agarwal & Anr. .. Respondents

...

Mr.S.A. Sawant for the appellant.

Mr.Ram Makhija for the respondent no.1.

Mr.Shiv Motariaya for the respondent no.2.

Mr.A.M. Shringarpure, APP for the State.

CORAM : V.M. KANADE, J

DATED : 21st December 2004.

P.C:-

1. Heard the learned counsel appearing on behalf of the appellant and the learned counsel for the respondents.

2. The appellant has filed this appeal challenging the judgement and order passed by the JMFC no.6 Pune dismissing the complaint filed by the

appellant by order dated 1st August 2003. Thereafter, the appellant had filed an application for restoration of the complaint which was dismissed for default. The learned Magistrate however dismissed the application for restoration by order dated 21st August 2003. The appellant is challenging these orders passed by the Magistrate viz. order dated 1.8.2003 dismissing the complaint for non appearance of the complaint u/s.256 of the Code of Criminal Procedure and order dated 21.8.2003 dismissing the application filed by the complainant for restoration of the complaint. All the respondents are served and are represented by their respective counsel. Leave granted. Appeal is taken up for hearing forthwith.

3. The learned counsel appearing on behalf of the appellant submitted that the complainant was regularly attending the Court and she had appointed a lawyer in the said criminal case. It was submitted that on 30.7.2003, the complaint was kept for recording of evidence but since the complainant was sick, her Advocate had filed an application for exemption. It was submitted that the said application was granted by the learned Judge and cost of Rs.100/- was imposed and orally had given the next date as 2.8.2003. It was

submitted that the Advocate for the complainant/ appellant had left the Court under the impression that the next date is on 2.8.2003. However, in the roznama and the "ready board", the date which was mentioned was 1.8.2003. It was submitted that under these circumstances on 1.8.2003, the complainant and her Advocate both were absent and the case was dismissed for default. Her application for restoration of the complaint was also dismissed by order dated 21.8.2003. It was therefore, submitted that the order of dismissal of the complaint be set aside and the complaint be restored to file.

3. The learned counsel for the respondent submitted that the complaint had remained absent on 22.7.2003, 28.7.2003, 30.7.2003 and also on 1.8.2003. It was submitted that the learned Magistrate had recorded in the roznama that the case was adjourned to 1.8.2003. It was submitted that therefore, the contention of the complainant that the matter was adjourned to 2.8.2003 is not correct. It was submitted that the learned Magistrate had dismissed the complaint while exercising its discretion u/s.256 of the Code of Criminal Procedure and had acquitted the accused. The learned counsel appearing on behalf

of the respondent relied on two judgements of the Supreme Court reported in AIR 1977 Supreme Court 2432 in the case of Bindeshwari Prasad Singh Vs. Kali Singh and in the case of Major Genl. A.S. Gauraya & Anr. Vs. S.N. Thakur reported in AIR 1986 Supreme Court 1440. He submitted that in both these judgements, the Apex Court had held that the Magistrate has no inherent power to review his order of dismissal and restore the case. The learned counsel appearing on behalf of the respondent no.2 submitted that the complainant had continuously remained absent and therefore, no case was made out for restoration of the complaint. He submitted that the appeal filed by the complainant is therefore liable to be dismissed.

4. Since the only question involved in this case is whether the dismissal of the complaint by the Magistrate u/s.256 of the Code of Criminal Procedure is proper or not, the appeal is taken up for final hearing at the admission stage itself. In the present case, the appellant was working as a Stenographer with the respondent no.2 and it is alleged by her that he had committed rape on her and therefore, a complaint was filed against the respondent u/s.376 of the IPC.

The accused was arrested and after some time, he was released on bail. After the accused was released on bail, he published various articles and sent letters to number of persons and it is alleged by the complainant that she was defamed by the respondents by publishing these articles in the newspapers. The said complaint came for hearing before the learned Magistrate. It appears from the record that the learned Magistrate appears to have fixed the hearing in July 2003. The record shows that initially the case was fixed for hearing on 22.7.2003 and thereafter it was adjourned to 28.7.2003. Thereafter, it was fixed for hearing on 30.7.203. On all these dates, an application was made by the complainant seeking exemption from appearing in the Court on account of her illness. It was expected that reasonable time ought to have been given in a case where an application was filed on the ground of personal illness. Initially, the case was fixed for hearing on 22.7.2003. An application for exemption was filed and was granted. Thereafter it was adjourned to 28.7.2003. Again an application for exemption was made and the case was fixed on 30.8.2003. i.e. after two days. On 30.7.2003, again an application was made for exemption on account of the illness of the

complainant. The application was allowed and cost of Rs.100/- was imposed. The matter was thereafter fixed on 1st August 2003 and the learned Magistrate promptly rejected the complaint and acquitted the accused. The ground which is given by the complainant for remaining absent is that orally it was stated that her case was fixed for hearing on 2nd August 2003 though in the Roznama it was mentioned that it was kept on 1st August 2003 and therefore, she could not remain present. In my view, the said ground which is given is a sufficient ground and the explanation offered is a plausible explanation for not remaining present on the said date. The complainant had remained present on each and every date from the date of issuance of process and had diligently attended the matter. The learned Magistrate erred in passing the order under section 256 merely because she remained absent on one date.

5. In view of the judgement of the Supreme Court in Bindeshwari Prasad Singh and Major Genl.A.S. Gauraya (Supra), the Magistrate in any case had no jurisdiction to recall the judicial order passed by him.

6. The learned Magistrate is directed to decide the case on merits as expeditiously as possible and in any case within a period of six months from today.

V.M. KANADE, J